88-882
No._____

Supreme Court, U.S.
FILED
OCT 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

Albert and Edward Bosselait, Petitioners

v.

State of New Hampshire Department of Employment Security, and Spaulding Youth Center, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE

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QUESTIONS PRESENTED

I. Did the Supreme Court of New Hampshire err when it said two uncounseled elderly and laid-off janitors had not adequately preserved their Federal claims (at a nonjudicial unemployment compensation tribunal powerless to rule on the issues) when they argued the law was "discriminating against them" and "can always be fixed" instead of explicitly citing 29 U.S.C.§791 and the equal protection clause of the Fourteenth Amendment?

II. Does the N.H. unemployment compensation statute discriminate in violation of the Federal Rehabilitation Act, 29 U.S.C.§794 insofar as it denies unemployment benefits to two laid off janitors otherwise eligible for benefits who cannot work full time because of their health and handicaps at their ages (of 76 and 79)?

III. Does the equal protection clause guarantee two laid off part-time janitors, who have worked their entire lives, and other partially disabled workers an opportunity for an individualized determination of availability and attachment to the labor market, as required by Turner v. Department of Empl. Sec. 423 U.S. 44 (1975) and as afforded all other New Hampshire unemployment compensation claimants?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE

Petitioners, Albert and Edward Bosselait, respectfully pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of New Hampshire, entered July 29, 1988, when the Court denied a rehearing of its decision and opinion of July 8, 1988, which affirmed the denial of petitioners' claim for unemployment compensation benefits.

OPINION BELOW

The decision of the Appeal Tribunal is attached as Appendix A. The decision of the Appellate Division is attached as Appendix B. The decision of the New Hampshire Supreme Court (Souter, J.) is unreported and is attached hereto as Appendix C.

JURISDICTION

After the decision of the New Hampshire Supreme Court dated July 8, 1988, petitioner timely moved for a rehearing, which was denied by order dated July 29, 1988, attached as Appendix D.

This Court's jurisdiction is invoked pursuant to 28 U.S.C.§1257(3). As the issue of this Court's jurisdiction is entwined with the first Question Presented, the Statement of the Case elaborates on the manner in which petitioners' claims were raised.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment, §1:

[Citizenship rights not to be abridged by states.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

29 U.S.C.§794(Supp. 1987) Nondiscrimination under Federal grants and programs; promulgation of rules and regulations.

No otherwise qualified individual with handicaps...shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

New Hampshire RSA 282-A:31,I(d) Benefit Eligibility Conditions.

1. An unemployed individual shall be eligible to receive benefits with respect to any week only if the Commissiner finds that:

(d) He is available for and seeking permanent, full-time work for which he is qualified.

STATEMENT OF THE CASE

Edward and Albert Bosselait - now ages 78 and 81 - worked their entire lives. In addition to their regular full-time employment, they started sharing another full-time job as janitors at Spaulding Youth Center in Tilton, New Hampshire in 1964 by each working 4 hours per day. After retiring from their full-time jobs in the mid 1970's, Albert and Edward continued at Spaulding until they and some 30 full-time workers were laid off in 1986 through no fault of their own.

The other laid-off workers - at least those able to work a full day but unable to find work- could obtain unemployment benefits based on their wages in the previous year. The Bosselaits - unable to any longer do manual labor for a full day, but fully able to do many part-time janitorial jobs - were denied unemployment benefits because of their inability to work a full day because of their physical handicaps at their age.

This case challenges the state imposed discrimination in RSA 282-A:31,I(d) that denies to the Bosselaits (and others with physical or mental handicaps which limit their hours of work) what all other laid off workers in New Hampshire are entitled to: an oportunity to show that there is a labor market for the services they offer.

Since their initial hearing over two years ago, the Bosselaits have challenged this law "discriminating against" them. [Transcript of Appeal Tribunal, in Certified Record before the New Hampshire Supreme Court, page 49; hereinafter R]. They contend that such discrimination is violative of the Federal law prohibiting discrimination against the handicapped in federally assisted programs (29 U.S.C.§794; §504 of the Rehabilitation Act) and the equal protection clause of the Fourteenth Amendment.

Although the New Hampshire Supreme Court Opinion states that "[n]ot one of these issues ...

has been ... timely raised below", Appendix C at page A-15 it went on to discuss and, in essence, pass on the §504 claim at length, id pages A 19-25. Similarly, the equal protection claim is also discussed and in essence, passed on, at length, id. pages A 25-31. Under this Court's line of cases that hold "[t] here can be no question as to the proper presentation of a federal claim when the highest state court passes on it", Raley v. Ohio, 360 U.S. 423, 436-7(1959), this Court has jurisdiction to hear these claims. But, as the Supreme Court of New Hampshire's opinion also indicates that the issues were not properly raised, it is necessary to elaborate on how the Federal claims were presented and preserved throughout these proceedings.

How The Federal Questions Were Presented

The Record indicates as follows:

1. In July 1986, the Bosselaits applied for unemployment compensation benefits when they were laid off through no fault of their own, were looking for work, and had no restrictions except that their health foreclosed full-time manual labor.

2. In forms provided by the Department, Albert indicated he had "physical handicaps" of a

"weak back" and was "limited" to "20 hours a week" (R 115B and R112); and Edward indicated "physical handicaps" of "partial eyesight, angina" (R95B).

3. They were denied benefits on July 9, 1986 by a certifying officer because "New Hampshire Unemployment Compensation law requires that an individual be available for and seeking permanent full-time work for which he is qualified..." (R100). They had two weeks to appeal and did so.

4. On July 30, 1986 they appeared unrepresented by an attorney (and accompanied by their state representative) before the Appeals Tribunal, which had the information about their handicaps. At the hearing, there was no mistake about the nature of the Bosselaits' claims or about their inability to work a full day.

> [The Chairman]: "Now you're saying that the whole crutch [sic] of the matter is than [sic] you're saying you cannot work more than four hours a day?" (R 48) (emphasis added)
>
> Albert: "That sounds right...I'm seventy-six and he's seventy-nine."
>
> . . . . .
>
> Edward: "I'm seventy-nine and I'm not gonna play with my health...You think because we don't want to work. [R49]
>
> Demers [Chairman]. No, No.

. . . . .

[a discussion of the law requiring a search for full-time work ensued and Edward said]

"I think that it's discriminating against old fellas... we think that... the law is the law. It can always be fixed." (Emphasis added)

Chairman Demers "I hope you realize we have no control about the law". (R50)

5. The Appeal Tribunal, a lay body without judicial authority, ruled against the Petitioners on August 20, 1986, acknowledging their claim.

> The claimant will not accept any work which requires him to work over four hours per day. He contends that the law denying him benefits is discriminating...
>
> The Appeal Tribunal...finds that the claimant is not ready, willing and able to accept and perform suitable work...during all of the hours for which there is a market...(R83) (emphasis added).

6. The Bosselaits obtained counsel who immediately on September 16 sought to appeal to the Appellate Division claiming

> Such discrimination against primarily the elderly (the handicapped, and women with small children) cannot survive scrutiny under the equal protection clauses and guarantees and the anti-discrimination provision of state and Federal constitutional and statutory provisions". (R76)

7. On September 16th, the Bosselaits, through counsel, also sought to have the Commissioner of the Department of Employment Security reopen alleging that the full-time requirement "conflict(s) with the state and Federal

constitutional and statutory requirements prohibiting discrimination against these groups" [including the "working handicapped"]. (R81) and cited the "equal protection clause of the United States Constitution" (R80).

8. Neither the Appellate Division nor the Commissioner responded favorably because each considered these requests untimely and an initial appeal to the New Hampshire Supreme Court was taken. That appeal led to a December 11, 1986 per curiam Supreme Court opinion "remand[ing] to the appellate division...for a hearing on the merits of appellants' claims". [R56].

9. At the hearing before the Appellate Division - an administrative body empowered to decide legal and constitutional issues - the Bosselaits argued at length that the "full-time requirement" violated the "Federal Constitutional Right to Equal Protection" (R25-R36) and "adopt[ed] and incorporate[d] the lengthy brief of the Developmental Disabilities Advocacy Center, an amicus, "on the issues under §504 of the Rehabilitation Act of 1973" and "29 C.F.R. 32 of discrimination against the handicapped". (R29)

10. The Appellate Division ruled against the Bosselaits on April 27, 1987, deciding both the statutory and constitutional issues (A 3-9) citing two of this Court's §504 cases.

11. A Motion to Reconsider by the Bosselaits was filed with the Appellate Division discussing Southeastern Community College v. Davis 442 U.S. 397(1979) and pointing out that

> Given the other ways to test for a labor market, the full-time requirement acts as a barrier akin to wheel chair inaccessible buildings and is illegal. (R5)
>
> and again alleging a violation "of equal protection of the laws". R6.

12. The Bosselaits next filed a Petition for Appeal with the New Hampshire Supreme Court explicitly raising the issues of whether the full-time requirement violated "federal law and/or...federal constitutional guarantees of due process and equal protection" (see Appendix A-33) in their Questions Presented, and also explicitly cited "Section 504 of the Federal Rehabilitation Act" in their Summary of Claims. Nevertheless, the New Hampshire Supreme Court said the "federal statutory issues [were not included and] were thus waived". Appeal of Albert and Edward Bosselait Appendix C A -16.

13. Petitioners' Brief in the Supreme Court included several pages and a heading concerning §504, and eleven pages on equal protection analysis and argument. Their 23 page Reply Brief dealt primarily with whether the Bosselaits were

considered handicapped and §504 and equal protection.

Notwithstanding this flood of Federal questions raised by the Bosselaits throughout these proceedings, the New Hampshire Supreme Court Opinion advances the startling proposition that the Bosselaits, appearing pro se, should have made what amounts to a "citation to book and verse" Eddings v. Oklahoma 455 U.S. 104,113-14 n.9, of the basis of their claims before the layperson Appeal Tribunal (which was powerless to consider their claims). See Appendix C at page A-16.

The New Hampshire Supreme Court's opinion - after apparently finding that the Federal issues had not been raised appropriately - then discussed (and arguably decided) them at great length.

In their Motion to Reconsider to the New Hampshire Supreme Court, dated July 18, 1988, the Bosselaits pointed out that the holding was contrary to §504 and to Federal cases concerning exhaustion and futility. The Motion also contended that the "...Court's failure to reach or remand on the §504 issue is itself a violation of Federal law". The Bosselaits again raised their equal protection claim.

REASONS FOR GRANTING THE WRIT

I. PROTECTION OF FEDERAL RIGHTS (AND PRESENTATION OF FEDERAL QUESTIONS) SHOULD NOT DEPEND ON MEANINGLESS FORMALISM AND UNNECESSARY FORMALITIES.

If, as in Raley, supra., the New Hampshire Supreme Court's detailed discussion of the Federal issues is not sufficient to confer jurisdiction on this Court, this Court should review the case to reaffirm the principle that a state court cannot deprive this Court of jurisdiction of important Federal questions by claiming noncompliance with state procedural rules. CF. Henry v. Mississippi, 379 U.S. 443,447, 85 S. Ct. 564,567(1965).

Petitioners acknowledge that review is inappropriate if the decision below rests on an independent and adequate state ground, but a state procedural ground which departs radically from past state court practice cannot be an independent basis for foreclosing review. This Court has held that "[n]ovelty in procedural requirements cannot be permitted to thwart review in this court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights..." NAACP v. Alabama, 357 U.S. 449, 457-8 (1958).

Further, "[w]hatever springs the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." Davis v. Wechler, 263 U.S. 22,24, (1923). Therefore, the New Hampshire Supreme Court's apparent holding that the petitioners failed to raise federal statutory issues in their appeal petition and in the "trial" forum of the appeal tribunal should be no more insulated from review than the decisions in Henry, NAACP, and Davis.

As the discussion in the Section "How the Federal Claims Were Raised" makes clear, not only did the New Hampshire Supreme Court simply err about what was in the Questions Presented to it, (Appendix E hereto) but it imposed an unprecedented and unjustified burden on lay people appearing before an administrative tribunal on 3 weeks notice.

Unlike its previous holdings that appeals in unemployment compensation cases "should be simple, prompt, and non-legalistic"..., Appeal of Gallant, 125 N.H. 83(1984), the Supreme Court said that the Bosselaits waived their claims because they failed to cite at the Appeal Tribunal the section of Federal law that supported their unambiguous claim that the full-time requirement of the law was "discriminating against" them.

Other than blocking this Court's review of the Federal questions, there is no discernable explanation or rationale for the the New Hampshire Supreme Court requiring more of lay people involved in a rapid fire administrative proceeding than of lawyers involved in drawn out litigation. By contrast to the burden placed on and the barrier placed in front of the Bosselaits by its holding, the New Hampshire Supreme Court has said: "It is probably no exaggeration to say that in no state is pleading treated more liberally [to aid in the promotion of justice] and regarded less of a game..." Berlinguette v. Stanton, 120 N.H. 760, 762,423 A.2d 289(1980).

Because it is clear from the transcript that the Appeal Tribunal understood the nature of the Bosselaits' challenge, for the New Hampshire Supreme Court to insist that in order to preserve their federal statutory claim under the Rehabilitation Act, 29 USC §791, the petitioners should have cited to the statute specifically is to "force resort to an arid ritual of meaningless form." Staub v. City of Baxley, 355 U.S. 313,320(1958). This is especially true as the administrative tribunal both understood the Bosselaits were challenging discrimination in the law and correctly regarded itself as having "no control about the law" (R50). While an important state interest in

enforcing a procedural rule may bar vindication of important federal rights, in this case there is no legitimate state interest to be gained from insisting on formal legal pleadings at the appeal tribunal.

If the New Hampshire Supreme Court's decision is allowed to go unreviewed,this Court will send an ominous signal to it and other courts that important Federal questions can be avoided by insistence on lay people fulfilling legalistic gestures in a forum where such gestures would be futile.

II. THIS CASE RAISES IMPORTANT AND UNRESOLVED ISSUES CONCERNING WHO §504 PROTECTS AND WHAT PROTECTION IT OFFERS; THE DECISION BELOW CLASHES WITH PRECEDENT AND NARROWS THE LAW'S REACH.

(A) Do Unemployment Programs Have To Make Adjustments Similar to Employment Programs?

Section 504, 29 U.S.C. §794 embodies this Nation's overdue and noble efforts to treat the handicapped fairly and remove artificial barriers from their participation in society - or at least in federally supported programs.

The law requires "reasonable accomodation" be made for "otherwise qualified" but handicapped individuals. With Federally supported employment programs, one of the examples given by the Secretary of Labor of such a reasonable accomodation is "part-time or modified work

schedules" 29 C.F.R §32.3. The Bosselaits ask the simple but important question: Does the same law require a similar reasonable accomodation in New Hampshire's federally supported unemployment program?

The answer to that question is of great concern to those states - a majority by the Department of Employment Security's count - which deny benefits to workers who can only work part-time. Even before the country hits its next economic downturn, the answer is important for the part-time worker limited by his or her handicap to less than 8 hours work per day. Such workers are the ones who are often laid off first - and under the New Hampshire Supreme Court's decision, such layoffs are encouraged, because they can be done with no effect on the employer's tax rate.

(B) Who is "Handicapped"?

In addition, this case cries out for review because of the New Hampshire Supreme Court's handling of the question of whether or not the Bosselaits are entitled to be considered handicapped in order to receive any protection under §504. For the Appeal Tribunal, the only fact-finder in this case, the matter was simple:

> "...the whole crutch [sic] of the matter is than [sic] you're saying you cannot work more than four hours a day?" [empahsis added]

The Appeal Tribunal accepted the Bosselaits oral and written representations about physical limitations at their age and ruled against them because they could not meet the full-time requirement at issue.

Yet, the New Hampshire Supreme Court Opinion concludes "that if the plantiffs were unable to satisfy the full-time work requirement, the reason was not a handicap, but the plaintiffs' ages". Appeal of Albert and Edward Bosselait Appendix C hereto, at p. A-22.

It is difficult to square the New Hampshire Supreme Court's concept of a handicapped individual with: (a) the facts of this case; (b) the definitions of a handicapped individual in the Rehabilitation Act and in the Regulations pertaining to the unemployment program in 29 C.F.R.§32.3', and the discussion in School Board of Nassau County v. Arline, 107 S.Ct 1123.

The Rehabilitation Act covers:

> "[A]ny person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment or (iii) is regarded as haivng such an impairment." 29 USC Sec. 706(7)(B).

The implementing regulation should have left little question that the Bosselaits were "handicapped":

> (a) Handicapped individual means any person who [h]as a physical or mental impairment which substantially limits one or more major life activities",

where major life activities are defined as:

> "...functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, and receiving education or vocation training." 29 C.F.R. §32.3 (emphasis added).

In Arline, supra, where the Court determined that the effects of a contagious condition on the associates of the plaintiff were sufficient to confer a handicap, this Court interpreted Congress' intent as to provide a broad definition of "handicapped individual".

The New Hampshire Supreme Court's decision flies in the face of such intent. Are those individuals near eighty years of age to be denied the protection of §504 when their health fails them specifically because they are nearly eighty?

(C) What is a "Reasonable Accomodation"?

A handicapped individual who cannot meet all of a program's requirements is not otherwise qualified if there is a factual basis in the record reasonably demonstrating that accomodating that

individual would require either a modification of the essential nature of the program, or impose an undue burden on the recipient of federal funds. Strathie v. Department of Transportation, 716 F.2d 227 (3rd Cir. 1983).

There can be no basis for arguing that paying unemployment compensation to workers seeking part time work would frustrate the purpose of the program. Consequently a refusal to modify the program must be justified by its causing an undue burden on the State.

New Hampshire provided unemployment compensation to part time workers for the first 40 years that the program existed. The law was amended to include the "full-time" language in 1977. Many other states provide unemployment compensation to part time workers. It does indeed seem likely that requiring the State, once again, to pay compensation to handicapped part time workers is a reasonable accomodation. This is especially true because the part-time worker's wages are fully taxed to support the system and any burden on the unemployment fund can be negated by adjusting benefits to all workers. This Court should decide if Congress intended such adjustments.

(D) When Can The Handicapped Be Barred From A Federally Supported Program?

A last §504 issue of importance is whether a federally supported benefit program can create a complete bar to a worker whose physical limitations prevent full time work. In Alexander v. Choate, 469 U.S. 287(1985), the Court addressed a question which, while perhaps appearing similar to the Bosselait case, differed critically. The plaintiffs in Alexander were in no way precluded from participation in the program as administered by the State of Tennessee. Rather the plaintiffs merely wanted the program expanded to more completely fulfill their needs. The Bosselait case reaches the issue left unanswered by Alexander.

In Alexander, Justice Marshall articulated the two countervailing considerations that must be employed in determining whether there has been a breach of the Rehabilitation Act. A State must try to meet the objectives of the Act while keeping it within manageable bounds. Id at 299. With regard to the objectives of the Act, it is now established that Congress intended to reach beyond invidious discrimination into acts and actions that merely have a "disparate impact" on handicapped individuals. Id at 295-296. Further, the Court held that a benefit, "cannot be defined in a way that

effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled". Id at 301.

The full time requirement in the New Hampshire statute does have a disparate impact on the class of which petitioners are members. And it does effectively deny meaningful access to "otherwise qualified individuals". While the statute precludes from participation those who, because of other demands on their time or simply out of preference, do not seek full time work, it also has the effect of precluding those who, because of some "physical or mental impairment which substantially limits one or more of such person's major life activities", are unable to work full time. An individual without a handicap may qualify for unemployment compensation by simply agreeing to accept full time work, irrespective of whether his past employment has been full time or parttime. This opportunity is not similarly available to many handicapped individuals, such as the Bosselaits, whose handicaps prevent them from doing so. This, by definition, is a disparate impact.

The implications of this issue extend much further than simply to those individuals who, because of the disabilities accompanying age, cannot work a full day. There are a multitude of physical or mental disabilities that limit an individual's ability to work an eight hour day.

Chemotherapy, sickle cell anemia, chronic fatigue syndrome, heart disease, dialysis treatment, arthritis, AIDS and AIDS Related Complex, emphysema, multiple sclerosis and a myriad of other disabilities and treatments may limit an individual's endurance and availability for full time employment. Yet, by the very wording of the New Hampshire statute and the holding below, these individuals are automatically excluded from participation in the unemployment compensation program.

III. THIS CASE PROVIDES AN OPPORTUNITY TO CLARIFY THE APPLICATION OF FOURTEENTH AMENDMENT CASES FROM TURNER TO CLEBURNE.

> "The Fourteenth Amendment requires that unemployment compensation boards no less than school boards must achieve legitimate state ends through more individualized means when basic human liberties are at stake". Turner v. Dept. of Employment Security, 423 U.S. 44,46 (1975).

In Turner, this Court invalidated without oral argument Utah's disqualification for unemployment benefits for women who were otherwise eligible but were presumed " 'unable to work' during [an] 18-week period because of pregnancy and

childbirth" id. at 45. Here, the Bosselaits were likewise presumed "unable to [or more accurately unavailable for] work" by conditions beyond their control. Despite the Bosselaits'

(a) long history of excellent work;

(b) involuntary layoff from their jobs;

(c) diligent search for work;

(d) providing the Department with its own list of over 50 part-time janitorial vacancies; i.e. a market for their services;

they were conclusively presumed ineligible for benefits available to their recent co-workers because of handicaps which limited their work day, but not their unquestioned ability to work.

If Turner remains valid, it is hard to understand why handicapped workers are not entitled to the individualized determination guaranteed Utah's pregnant women and all other New Hampshire claimants on the issue of whether there is a market for the services they offer.

Turner characterizes the state's justification in the expediency embodied in using a presumption as inadequate in the face of the "basic human liberties...at stake" id at 46. And thus, in assessing the level of scrutiny afforded to barriers discriminating against those with handicaps, it would be helpful for this Court to provide guidance for lower courts applying the three opinions in

Cleburne v. Cleburne Learning Center, Inc. 473 U.S. 432(1985). Even with the minimal scrutiny afforded classifications in social welfare programs, the discrimination embodied in the full-time requirement against those who have worked but cannot work a full day seems as offensive to the Cleburne holding as to the Bosselaits, who decried the law "discriminating against" them.

The issue takes on special importance for a variety of reasons - which can be easily listed.

1. The growing market for part-time workers; the U.S. Department of Labor "Monthly Labor Review" Feb.1986, p. 16 indicates that 24,682,000 people were working part time and 17,340,000 of those usually worked part-time. Employers may provide them less or no benefits than full-time workers, but can and should the state be allowed to repeat such discrimination when the workers become involuntarily unemployed?

2. The nationwide push for deinstitutionalization of the mentally and emotionally handicapped and the similar thrust to mainstream the physically handicapped; does the Constitution protect those whose limitations prevent full-time work? Cleburne itself insisted on the removal of artificial governmental restrictions preventing the handicapped from participating in group homes; does the decision reach similar discrimination in (un)employment programs?

3. The need of many elderly or handicapped throughout the nation who cannot work a full day to supplement other resources; does the Constitution offer them protection? The Labor Department statistics, supra, indicate that there were 144,000 part-time workers who usually worked part-time because of their health (like the Bosselaits for a decade) and 1,395,000 who usually worked full-time but could not at the time of the survey because of health reasons.

It seems worthy of this Court's consideration to decide definitively what constitutional protection is afforded the handicapped and whether the state and federal governments can set up a nationwide system of insurance against involuntary unemployment, and then, consistent with the guarantee of equal protection of the laws, leave out of it those most vulnerable to involuntary unemployment.

CONCLUSION

For the reasons stated above, a Writ of Certiorari should issue to review the judgment of the Supreme Court of New Hampshire.

Respectfully submitted,

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APPENDIX A

STATE OF NEW HAMPSHIRE
DEPARTMENT OF EMPLOYMENT SECURITY
317 LINCOLN STREET, MANCHESTER, NH 03103

DECISION OF APPEAL TRIBUNAL

Edward P. Bosselait — Docket No. 1121-86
001 03 9230 — Laconia
Spaulding Youth Center, Inc.

Benefits denied, claimant appealed.

APPEARANCES: Claimant with witness and representative.

FINDINGS: The claimant, 79 years of age, was employed as a part-time janitor by Spaulding Youth Center, Inc. from 1964 until June 30, 1986 at which time he was laid off when the employer sub-contracted his job to a professional cleaning firm. He worked fours hour a day from 4:00 p.m. until 9:00 p.m., Monday through Friday, at $5.23 per hour.

The claimant will not accept any work which requires him to work over four hours per day. He contends that the law denying him benefits is discriminatory to the elderly and should be changed to allow benefits to persons who work part-time only.

The Appeal Tribunal, after considering all the records and testimony, finds that the claimant is not ready, willing and able to accept and perform suitable work on all of the shifts and during all of the hours for which there is a market for the services he offers and he is not available and seeking permanent, full-time work and he therefore does not meet the eligibility requirements of the law within the meaning of RSA 282-A:31, I(c) and (d).

DECISION: The claimant is ineligible to receive benefits from June 30, 1986 through July 19, 1986 and until he shows that he is ready, willing and able to accept and perform suitable work on all of the shifts and during all of the hours for which there is a market for the services he offers and that he has exposed himself to employment to the extent commensurate with the economic conditions and the efforts of a reasonably prudent person seeking work.

Unanimous decision of the Appeal Tribunal: Merrill, Management; Buckham, Labor; Demers, Chairman.

Roland P. Demers
Chairman of the
Appeal Tribunal

Held: 7/30/86
Mailed: 8/20/86

APPENDIX B

STATE OF NEW HAMPSHIRE

DEPARTMENT OF EMPLOYMENT SECURITY
Appellate Division
32 South Main Street • Concord, N.H. 03301-4857

Kendall W. Lane, Chairman
Joseph Stewart, Vice-Chairman
Eli Isaacson
Anne M. Hirshberg
Roger E. Gagnon

APPELLATE DIVISION DECISION
DOCKET #0065-86

(A) PARTIES

1. CLAIMANT: Albert J. Bosselait, 003-10-5676, Appellant

2. EMPLOYER: Spaulding Youth Center, Appellee

3. DEPARTMENT OF EMPLOYMENT SECURITY:

Michael M. Black, Esquire

(B) CASE HISTORY

1. TYPE OF CLAIM: Able and Available RSA 282-A:31, I(c) & (d)
2. LOCAL OFFICE: Laconia
3. WEEKS AT ISSUE: From June 30, 1986 through July 19, 1986 and until the claimant shows that he is ready, willing and able to accept and perform suitable work on all of the shifts and during all of the hours for which there is a market for the services he offers and that he has exposed himself to employment to the extent commensurate with the economic conditions and the efforts of a reasonably prudent person seeking work.
4. APPEALED FROM: Appeal Tribunal Decision #1122-86; Merrill, Management; Bucknam, Labor; Demers, Chairman.
5. COMMISSIONER'S DENIAL OF REQUEST TO REOPEN - DATED: None (Remanded from New Hampshire Supreme Court)
6. DATE OF APPEAL: January 15, 1987
   HEARING: April 3, 1987

7. APPEARANCES: Bruce E. Friedman and Patt Starr of the Franklin Pierce Law Center, representative of the claimant; Department by Attorney Black.

(C) DECISION

Edward and Albert Bosselait worked part time as janitors for Spaulding Youth Center. They both worked four hours a day. They shared on eight-hour job, though the four hours they worked were concurrent. It was admitted they were physically able only to work four hours. NH RSA 282-A:31, (I)d provides that the claimant must be available for and seeking permanent full-time work for which he is qualified. The claimants in this case are not seeking permanent full-time work but rather are seeking only part-time work. Therefore, under the statute they are not eligible for unemployment compensation.

Amicas contends that RSA 282-A:31, I(d) violated a Section 504 of the Rehabilitation Act of 1973 and the regulations promulgated by the Secretary of Labor pursuant to said act. Amicas cites us to dicta in Schoolboard of Nassau City, Florida, et al v. Gene H. Arline, _____ US _____ (55 U.S.L.W. 4245, March 3, 1987). The issue in that case was whether or not a person suffering from a

contagious disease could be a handicapped person within Section 504 of the Rehabilitation Act. That question was answered in the affirmative. We believe the issue raised by Amicas is best addressed in the landmark case of Southeastern Community Collge v. Davis, 442 US 397 (1979). The Court faces several issues. The initial issue was the language of the statute itself. The Court found:

> "[s]ection 504 by its terms does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modifications in their programs to allow disabled persons to participate. Instead, it requires only that an 'otherwise qualified handicapped individual' not be excluded from participation in a federally funded program 'solely by reason of his handicap,' indicating only that mere possessionof a handicap is not a permissible ground for assuming an inability to function in a particular context." Id at 405.

In further addressing the language of the statute, the Court defined an otherwise qualified person as one who was able to meet all the program requirements in spite of his handicap. Id 506.

The Court also considered the regulations promulgated by the Department of Health, Education and Welfare, that respondent had pointed to as requiring a modification of the program to fit her needs. The Court stated:

> "[s]uch a fundamental alteration in the nature of a program is far more than the 'modification' the regulation requires." Id at 410.

Further in considering the regulations, the Court stated that:

> "[i]f these regulations were to require substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals, they would do more than clarify the meaning of s 504. Instead, they would constitute an unauthorized extension of the obligations imposed by the statute." Id at 410.

Finally, in considering the regulations, the Court found:

> "[h]ere, neither the language, purpose, nor history of s 504 reveals an intent to impose an

affirmative-action obligation on all recipients of federal funds. Accordingly, we hold that even if HEW has attempted to create such an obligation itself, it lacks the authority to do so." Id at 411, 412.

Similarly, the Secretary of Labor's regulations and the Act cannot be interpreted to impose such an obligation on the State of New Hampshire. The claimants have further argued RSA 282-A:31, I(d) as it applies to these claimants is unconstitutional as a violation of Article I, Part 1 of the New Hampshire Constitution. We cannot agree with this. The New Hampshire Supreme Court has held unemployment compensation rights to be purely statutory. Hallahan v. Riley, 94 NH 338; Pomponino v. State, 106 NH 273; Kurowski v. DES, 107 NH 177.

The Court has also stated the purpose of the Unemployment Compensation Act:

"...is to insure in limited measure against unemployment of individuals regularly attached through labor market which is not occasioned with their consent or by their fault." Welman v. Riley, 95 NH 507, 510.

The Court has held the purpose of the availability requirements:

> "...is to determine if he is unemployed because of lack of suitable job opportunities or for some other reason such as physical incompacity or unwillingness to work." Roukey v. Riley, 96 NH 351, 352.

There is no statutory or constitutional requirement that 100 percent of all employees be entitled to receive unemployment compensation benefits. The Legislature has stated there is no vested right to unemployment compensation (RSA 282-A:174). The purpose of the Unemployment Compensation Act and the availability requirements coupled with the State's interest in preserving the integrity of the Unemployment Compensation Trust Fund provide a constitutional basis for the distinction between full-time and part-time employment. We believe the facts surrounding the legislation support not only the "rational basis" test (which appears to apply to this appeal) but also that the "challenged classifications are reasonable and have a fair and substantial relation to the object of the legislation". Carson v. Maurer, 120 NH 925, 932, 936. This

statute does not create an unreasonable classification, and, therefore, the question of modifications to the statutory framework is an issue to be decided in the legislative forum of this State.

Therefore, the decision of the Appeal Tribunal is SUSTAINED.

Signed: Kendall W. Lane, Chairman

Concurring: Joseph Stewart, Vice Chairman

Roger Gagnon

Dated: April 24, 1987

APPENDIX C

NOTICE: This Opinion is subject to Motions for Rehearing under Rule 22 as well as formal revision before publication in the New Hampshire Reports. Readers are requested to notify the Clerk/Reporter, Supreme Court of New Hampshire, Supreme Court Building, Concord, New Hampshire 03301, of any errors in order that corrections may be made before the Opinion goes to press. THE CONTENTS OF THIS OPINION MAY BE DISCLOSED AT OR AFTER 8:00 A.M. ON THE DATE THE OPINION BEARS. IF THE OPINION IS RECEIVED BEFORE THAT TIME AND DATE, ITS CONTENTS SHOULD BE KEPT CONFIDENTIAL.

THE SUPREME COURT OF NEW HAMPSHIRE

Department of Employment Security
No. 87-159

APPEAL OF ALBERT AND EDWARD BOSSELAIT
(New Hampshire Department of Employment Security)

July 8, 1988

Bruce E. Friedman, Franklin Pierce Law Center Civil Practice Clinic, of Concord, by brief and orally, for the plaintiffs.

Stephen E. Merrill, attorney general (David S. Peck, assistant attorney general, on the brief and orally), for the State.

SOUTER, J. Two formerly part-time employees bring this appeal under RSA 282-A:67, I, from an order of an appeal tribunal of the department of employment security (DES), which denied them unemployment compensation because they were not "ready, willing and able" to accept and perform full-time work. We affirm.

The plaintiffs, Albert and Edward Bosselait, are brothers, who were 76 and 79 years old, respectively, at the time they filed their claims for benefits. For 22 years they shared a single full-time janitor's position at the Spaulding Youth Center in Northfield, each of them working four hours a day. It is not disputed that during the relevant time Spaulding was an employer within the meaning of the unemployment compensation act, see RSA 282-A:8, although it took advantage of its status as a charitable corporation to become in effect a self-insurer against any claims its employees might bring for benefits on account of unemployment, see RSA 282-A:69, II.

In 1986, Spaulding contracted with a third party for custodial services and eliminated about

35 positions, including the job held jointly by the plaintiffs. Following their discharge on June 30, 1986, the plaintiffs applied to DES for unemployment compensation benefits, and when a certifying officer rejected their claims, see RSA 282-A:44, they applied to an appeal tribunal within the department, see RSA 282-A:53. The tribunal held an evidentiary hearing, at which the plaintiffs were assisted by a lay representative, and each of them testified about limitations on his capacity to work. Mr. Albert Bosselait represented that he had a "weak back [that] goes out of joint when least expected" and his brother indicated that he was limited by partial eyesight and angina. They indicated forthrightly that they would not accept new jobs calling for more than four hours of work each day. Mr. Edward Bosselait testified that "we don't dare to work more than four hours a day at our age," and said that he was "not gonna play with [his] health."

When the tribunal called attention to the statutory eligibility requirement that an applicant must be "available for and seeking permanent, full-time work," see RSA 282-A:31, I(d), Mr. Edward Bosselait responded that "I think [the statute is] discriminating against old fellas. . . old

people." The tribunal found each plaintiff ineligible because he was "not ready, willing and able" to accept full-time work as the statute required. See RSA 282-A:31, I(c).

After the appeal tribunal's decision, the plaintiffs obtained legal counsel, who requested the commissioenr of DES to reopen the case before the tribunal, based on state and federal equal protection claims and general allegations that subparagraph (d) violated State and federal statutes prohibiting discrimination against mothers, the handicapped, and people over 65. When the commissioner refused to reopen, the plantiffs appealed the appeal tribunal decision to the appellate division of DES, see RSA 282-A:62, purporting to raise a State equal protection claim, and asserting a governmental obligation to provide unemployment compensation to mothers, the handicapped, and the elderly, who may be limited to part-time work. (The procedural history from appeal tribunal to appellate division is complicated in the extreme. See Appeal of Albert Bosselait & a., N.H. Supr. Ct. No. 86-430. Fortunately, its details have no bearing on the present appeal.)

The appellate division noted that it was admitted that the plantiffs were physically able to work only four hours a day, but rejected claims

that subparagraph (d) violated the State equal protection standard and conflicted with § 504 of the federal Rehabilitation Act of 1973, 29 U.S.C.A. § 794 (Supp. 1988). The appeal to this court under RSA 282-A:67 ensued. As we have explained elsewhere, see Appeal of Kelly, 129 N.H. 462, 466, 529 A.2d 935, 937 (1987), our jurisdiction is limited to reviewing the record of the appeal tribunal for errors of law, see RSA 282-A:67, IV, except insofar as that record may have been clarified or the issues limited in the course of subsequent proceedings before the appellate division.

The plaintiffs have challenged the denial of benefits by seeking to raise three issues before us. They claim that subparagraph (d) violates the federal Age Discrimination Act of 1975, 42 U.S.C.A. §6101 et seq. (1983); that it violates the federal Rehabilitation Act of 1973, 29 U.S.C.A. §791 et seq.; and that it violates State and federal cantitutional guarantees of equal protection of the laws. Not one of these issues, however, has been both timely raised below and preserved for consideration on appeal.

Under our Rule 10(1)(c), a party appealing from an administrative agency is limited to the questions "set forth in the petition [for appeal] or fairly comprised therein. . . " The petition in this

case sets out two questions, each of them raising an issue of equal protection under the State and National Constitutions. Any federal statutory issues were thus waived, although it does not appear that they were ever adequately raised before the appeal tribunal.

The record below contains no reference to the Age Discrimination Act, 42 U.S.C.A. §6101 et seq., and although Mr. Edward Bosselait stated before the appeal tribunal that he thought subparagraph (d) discriminated against the elderly, his remark could not reasonably have been understood as initiating a statutory claim under federal law. The review of proceedings before the appeal tribunal is likewise devoid of any reference to a claim under the Rehabilitation Act, 29 U.S.C.A. § 791 et seq. While the plaintiffs referred to their physical limitations, their remarks, again, were insufficient to put the tribunal on notice that it should address the factual as well as legal issues peculiar to such a federal statutory claim.

Thus it appears from the record that the plaintiffs not only failed to raise the statutory issues in their appeal petition to us, but failed to raise them initially in the trial forum of the appeal tribunal. Their belated attempts to inject the statutory issues into the appeal at this point

therefore run afoul of our rule that "issues [must be] raised at the earliest possible time, because trial forums should have a full opportunity to come to sound conclusions and to correct [claimed] errors in the first instance." Sklar Realty v. Town of Merrimack, 125 N.H. 321, 328, 480 A.2d 149, 153 (19884) (citation omitted). To this we may add that unless a claim is raised in the trial forum, there is no opportunity for a party to develop a factual record supporting his theory of relief, or to make an offer of proof sufficient to justify a demand to introduce relevant evidence and preserve an issue for appeal. (The commissioenr of DES is, of course, authorized by RSA 282-A:60 to permit a claimant to reopen a case within the time allowed in order to raise a new issue before an appeal tribunal, if the claimant has a reasonable explanation for his previous failure to raise the issue and can give an indication of legal and factual support for the position he wishes to take.)

Sklar is equally applicable, moreover, to bar consideration of the equal protection questions that the plaintiffs purport to preserve by listing them in this appeal petition, for these constitutional issues were never adequately raised before the appeal tribunal. While, as we noted above, one plaintiff expressed the view that subparagraph (d) was

discriminatory against the aged, neither he nor anyone on hs behalf expressed the view that the statute was therefore invalid as working a denial of equal protection. Since many statutes are candidates for enlightened amendment without thereby being in any way unconstitutional, the plaintiff's remark was not sufficient to put anyone on notice that he thereby meant to raise a constitutional issue. (We have not overlooked the fact that the plaintiffs sought to raise a State equal protection claim in the appellate division. The appellate division, however, is not the forum of trial whre issues may be raised initially in accordance with Sklar and like cases. The division provides an intermediate administrative appeal, in which issues previously raised may be waived or narrowed; it does not provide an opportunity to raise new issues for the first time. See Appeal of Kelly, 129 N.H. at 466, 529 A.2d at 937.)

We must in candor say, therefore, that if the state of the record had been adequately disclosed to us we would not have accepted this appeal. See Sup. Ct. R. 10. Because, however, the appellate division saw fit to deal with an issue under the Rehabilitation Act and to conclude that there was no violation of the State equal protection guarantee, and because similar claims may be raised in the future, there is some utility in speaking to these

issues here, rather than merely entering the summary affirmance that would be proper under Rule 25(1)(d).

Consideration of the claim under the Rehabilitation Act begins with the text of § 504, which is codified as 29 U.S.C.A. § 794 (Supp. 1988):

> "No otherwise qualified individual with handicaps. . . shall, solely by reason of his handicap . . . be denied the benefits of . . . any program . . . receiving Federal financial assistance."

"Individual with handicap" is defined as a person who has a

> "physical or mental impairment which substantially limits one or more of [a] person's major life activities,"

id. § 706(8)(B)(i), such as

> "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."

29 C.F.R. § 1613.702(c0 (1987).

While it is not disputed that the unemployment compensation scheme receives such federal assistance as to render § 504 applicable, and while it is not denied that the back, heart, and eyesight problems described by the plaintiffs may qualify as handicaps under § 706 (8)(B) (i), it is by no means obvious that the State statutory restriction of benefits to those who can and will accept full-time employment violates the federal statute. Here it is enough to identify two barriers to drawing any such conclusion in this case.

There is, first, the language of § 504, that no otherwise qualified individual may be denied benefits "solely by reason of his handicap." 29 U.S.C.A. § 794. Before this provision can be applied to invalidate State action denying a benefit there must, at the very least, be evidence adequate to support a finding of fact that the handicap is the sole reason for the denial. That is to say, proof of an exclusive causal link between handicap and denial of benefits is a necessary condition for finding a violation of § 504. (It is not in any simple sense a sufficient condition, however. See infra.) To satisfy this necessary condition in the present case, the plaintiffs would be required to prove not only that they suffered from handicaps but that the handicaps, and the handicaps alone,

rendered them unable to work a full day and, hence, unable to satisfy subparagraph (d).

The actual evidence, however, falls short of any such proof. It is neither common knowledge, nor do the plaintiffs claim, that a weak back, poor eyesight, or angina necessarily prevents an individual who can work four hours a day from working eight. The back was described as going out of joint "when least expected," and there was no indication that the eyesight got worse in the course of the day. Nor was there any testimony that the risk of angina symptoms varied with the duration, as distinguished from the intensity, of work. The nature of angina is, in any case, a subject sufficiently uncommon to every day experience as to require expert medical testimony before any conclusions can be drawn about its effect on the capacity to do a given job over a given time. See April v. Peront, 88 N.H. 309, 311, 188 A. 457, 458 (1936).

All that is left, then, is the candid testimony that the plaintiffs "don't dare to work more than four hours a day at [their ages]" and would not "play with [their] health," which would most reasonably be interpreted to mean that men close to eighty do not have the capacity for eight hours of physical labor every day without risk to their

health. Since the plaintiffs have made no claim that the risks suggested by the phrase "old age" amounted collectively to a handicap within the meaning of 29 U.S.C.A. § 706(8) (B) (i), a finder of fact could only conclude that if the plaintiffs were unable to satisfy the full-time work requirement, the reason was not a handicap, but the plaintiffs' ages. The appeal tribunal, therefore, would have had no evidentiary basis to find a violation of § 504 proceeding from the enforcement of subparagraph (d).

The second barrier to statutory relief appears if we assume for argument, and contrary to the evidence just discussed, that "handicaps" did preclude the plaintiffs from seeking and accepting full-time jobs. Again, our focus is on the statutory condition that a denial of benefits to an "otherwise qualified" applicant, 29 U.S.C.A. § 794, be "solely by reason of . . . handicap," id., before relief can be granted. Here, however, our concern is not with the need to prove a causal connection in fact between a handicap and ineligibility, but with a handicapped plaintiff's burden to demonstrate that he is "otherwise qualified" because the handicap is not a permissible basis for denying him the benefit in question.

A difficulty inherent in this burden arises once we recognize that some benefits may be

provided for purposes that cannot be achieved by extending them to individuals with certain handicaps. As one example that has already been subject to litigation, there are legitimate reasons to deny nursing education assistance to a person whose deafness cannot be corrected or compensated for sufficiently to permit her to act effectively and safely in the circumstances that nurses routinely confront. See Southeastern Community College v. Davis, 442 U.S. 397, 411 (1979).

Hence, a line must be drawn between legitimate eligibility standards, as exemplified in the case of the deaf nurse, and criteria that would violate § 504, and plaintiffs claiming a § 504 violation must prove something more than a mere causal link between handicap and denial of benefit. The Supreme Court of the United States has indicated that in cases involving the application of a facially neutral standard imposed without discriminatory animus, a § 504 violation may be established by evidence that the eligibility standard produces a disparate adverse impact with a "particular exclusionary" effect on a class of the handicapped, Alexander v. Choate, 469 U.S. 287, 302 (1985), which is unreasonable, see id. at 299 n. 19, either because there is no reasonable basis for the exclusion itself when considered in relation

to an appropriate governmental objective, see id. at 307-08, or because the exclusion could be eliminated without unreasonable expense, see Southeastern Community College v. Davis, supra at 412-13; Strathie v. Department of Transp., 716 F.2d 227, 231 (3rd cir. 1983); but see Southeastern Community College v. Davis, supra at 410-11 (no congressional intent to impose an affirmative action obligation on all recipients of federal funds).

Taking this as the rule, the present plaintiffs would not be entitled to relief under § 504 without demonstrating to the appropriate finder of fact that, although subparagraph (d) is facially neutral with respect to the handicapped (since it merely disqualifies those who are unable or unwilling to work full-time), it nonetheless has an exclusionary effect that falls with particular disparity on the handicapped. They would also have to satisfy the burden of demonstrating either that the full-time work criterion is unjustifiable by reference to any legitimate governmental objective, or that it would not be unreasonably costly or burdensome to expand the benefited class to include all the handicapped. These are, of course, tall evidentiary orders, which the plaintiffs did not attempt to address, or even request an opportunity to address, before the appeal tribunal, as the forum of trial.

They are consequently entitled to claim no relief under § 504.

We come to more familiar ground in reaching the issue under the State Cosntitution, part I, article 12, raised by the plaintiffs' contention that a denial of equal protection inheres in the restriction of benefits to those who are able and willing to work full-time. In addressing this State equal protection claim, the plaintiffs are principally concerned to persuade us to review the effect of subparagraph (d) under the so-called middle-tier test of Carson v. Maurer, 120 N.H. 925, 931-33, 424 A.2d 825, 830-31 (1980), which requires that legislation restricting the enjoyment of an "important substantive right" be reasonable, not arbitrary, and justified by a "fair and substantial" relationship to the effectuation of a legitimate governmental objective.

The plantiffs offer three arguments to support their claim that entitlement to unemployment compensation should be treated as an important substantive right for purposes of Carson. None of them is persuasive.

First, the plaintiffs argue for heightened scrutiny on the ground that part-time workers are taxed like all other workers to provide funds for paying unemployment compensation, but claimants from that class of part-time workers are refused

benefits to which workers are generally entitled. The argument carries the plaintiffs nowhere, however, for it rests on false assumptions of fact and law. First, workers like the plaintiffs are not taxed; their employers are taxed. See RSA 282-A:69, I. Nor are the employers' taxes in reality paid from the employees' pockets. While we may assume that unemployment compensation expenses, like other expenses of doing business, affect an employer's capacity and willingness to pay a given level of wages, it is not demonstrably apparent that employers' taxes generally (or, in this case, the employer's payments of benefits) are taken dollar-for-dollar from funds that would otherwise be expended in wages. The second mistaken assumption is that that those who work only part-time are denied benefits when they are unemployed. On the contrary, former part-time workers, like former full-time employees, are not disqualified unless they are unable or unwilling to take a full-time job as a condition of receiving unemployment compensation. That is to say, the members of the class affected by subparagraph (d) are not identified by the hours they used to work, but by the hours they can and will agree to work in the immediate future.

The second argument for heightened scrutiny purportedly rests on an analogy with federal cases

applying a middle-tier test under the fourteenth amendment for reviewing disparate treatment based on gender, because of its immutability as a characteristic. See, e.g., Califano v. Goldfarb, 430 U.S. 199 (1977). The plaintiffs argue that their age is as immutable as gender, and because subparagraph (d) is said to have a disparate effect on the elderly, it should receive middle-tier scrutiny. Whatever may be the merits of the analogy, the short answer to any suggestion that a distinction based on age merits middle-tier review under the National Constitution is answered by Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313-14 (1976), in which the Supreme Court of the United States rejected the argument for strict scrutiny of age discrimination claims, in favor of the rational basis test. See Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440-41 (1985) (collecting cases on levels of fourteenth amendment equal protection review); see also Washington v. Davis, 426 U.S. 229, 242 (1976) (non-dispositive significance of merely disparate impact in equal protection review). There is thus no basis to claim that State equal protection should grant the middle-tier scrutiny that federal equal protection would provide, because federal equal protection does not provide it.

Finally, the plaintiffs try to identify their interests with the rights on which middle-tier review was premised in Carson, 120 N.H. at 925, 424 A.2d at 825, and Estabrook v. American Hoist & Derrick, Inc., 127 N.H. 162, 498 A.2d 741 (1985). But to see why the present case bears no comparison with Carson and Estabrook, it is only necessary to recall that those cases dealt with selective restrictions on common law rights of action to recover for injuries. Here, on the contrary, we are not dealing with any common law right of recovery that was superseded by the unemployment compensation scheme, for the latter is entirely a creation of Adams, 113 N.H. 370, 373, 308 A.2d 844, 846 (1973); Pomponio v. State, 106 N.H. 272, 274, 209 A.2d 733, 734 (1965). Carson and Estabrook therefore have no bearing on the case.

If the analogy with Carson and Estabrook fails, however, comparisons with other prior cases are ready at hand. In Arsenault v. Abbott Furniture Corp., 122 N.H. 521, 522, 446 A.2d 1174, 1175 (1982), we considered an equal protection challenge to the benefit scheme under the workers' compensation act, RSA chapter 281, which we resolved by application of the rational basis test. We thus applied to alleged disparities in compensation for injuries related to employment

the same test we have since applied to equal protection challenges to compensation schedules in Petition of State Employees' Assoc. & Goulette, 129 N.H. 536, 540, 5290 A.2d 968, 971 (1987). Goulette's holdng exemplified a broader rule that legislation merely regulating economic benefits and burdens, with no other significant feature, is reviewable under the rational basis criterion when challenged under the equal protection clause for allegedly producing disparate treatment, or under the due process clause on the ground that even its impartial application is invalid. See Boehner v. State, 122 N.H. 79, 83-84, 441 A.2d 1146, 1148 (1982) (quoting Opinion of the Justices, 117 N.H. 749, 758, 379 A.2d 782, 788 (1977)); see also Cleburne v. Cleburne Learning Center, Inc., 473 U.S. at 440 (rational basis test applied to review "social or economic legislation" on fourteenth amendment equal protection review).

A challenge to differential treatment in the distribution of benefits under an unemployment compensation scheme thus presents a classic occasion to apply the rational basis test, and the burden therefore rests on the plaintiffs to demonstrate that the resriction of benefits to those able and willing to accept full-time work is not rationally related to the advancement of any legitimate governmental interest. See Boehner v. State, supra at 84, 441 A.2d at 1149. But this

they cannot do, for the State has identified two objectives that the legislature could find both to be served by the restriction in question and to further the admittedly proper State policy of mitigating the effects of involuntary unemployment.

The first such objective is to conserve the available funds for the benefit of those who need them most, by restricting eligibility for benefits to those who need them most. Those who need the funds most are those with no sources of income except their paychecks. Such claimants are likely to seek full-time work, because they will need the level of pay that only full-time work yields. Conversely, the legislature could infer that those who can or will work only part-time probably have another source of income or support that provide some mitigation for the effects of unemployment. The legislature could, in short, conclude that the full-time work requirement would effectively select the most needy applicants, for whose benefit the unemployment compensation funds should be conserved.

The second objective that could be found to be served by subparagraph (d) is that of limiting the unemployment itself to the briefest possible period, and thus limiting the demand for benefits accordingly. Because the applicant who restricts himself to part-time work thereby isolates himself

from a significant, and probably the major, segment of the job market, the legislature was entitled to infer that an applicant ready to take full-time work has a better chance of getting some job within any given period of time. Once the applicant has a job, he can of course look about for an alternative schedule more to his liking, since he and his family will not be subjected to unusual privation while he does so, and no employer will be taxed to compensate him while he makes the further search. But pending a successful completion of that further search, the legislative goals of limiting unemployment and its social costs will be served by inducing the unemployed to accept work full-time if that is what turns up first.

The scheme as so rationalized will not, admittedly, produce an exact equality of benefits and burdens among the variously identifiable segments of employable people. But the standard of equal protection makes no such demand, Boehner v. State, 122 N.H. at 85, 441 A.2d 1149-50, any more than it requires a court reviewing the effects of unemployment compensation to ignore the other societal benefits, such as social security, that are available to responsible and commendable job applicants like the plaintiffs, whose age prevents their acceptance of full-time work.

Affirmed. All concurred.

APPENDIX D

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 87-159 Appeal of Albert & Edward Bosselait

the court upon July 29, 1988 made the following order:

Plaintiffs' motion for rehearing or reconsideration is denied.

Distribution:
Bruce E. Friedman
Daniel J. Mullen
Spaulding Youth Center, Inc.

Ralph H. Wood,
Clerk

APPENDIX E

C. QUESTIONS PRESENTED

1. Does RSA 282-A:31, I(d) violate federal law and/or state and federal constitutional guarantees of due process and equal protection in that it denies unemployment compensation benefits to an involuntarily unemployed part-time worker who is actively seeking permanent part-time work for which a market exists solely because he or she is unwilling or unable to seek full-time work? [This issue was presented to D.E.S and properly preserved.]

2. Does RSA 282-A:31, I(d) violate federal law and/or the state and federal constitutional guarantees of equal protection in that it discriminates against part-time workers, the majority of whom are elderly, handicapped or females with domestic responsibilities? [This issue was presented to D.E.S. and properly preserved.]